

1 MS. SCHMELTZER: Your Honor, I think we may be able
2 to handle this quite easily. If Mr. Honig will stipulate that
3 this declaration only applies to the license period, we don't
4 have any, there's no controversy here, because we did not
5 place ads in The Centennial (Phonetic) until January 25, 1990,
6 and that's on the record, that's --

7 JUDGE STEINBERG: That's in Exhibit 4, Attachment 9.

8 MS. SCHMELTZER: I believe, is that what it is?

9 MR. HONIG: Is that offered as a stipulation and if
10 so, it's accepted, and we don't need this witness. I agree.

11 MS. SCHMELTZER: It's in 5. This, this declaration
12 is --

13 JUDGE STEINBERG: Why don't we go off the record, or
14 do you want to work on a stipulation off the record and then
15 put it on the record.

16 MR. HONIG: I think -- offered. I've accepted it.

17 MS. SCHMELTZER: The we don't need the declaration
18 in the record.

19 JUDGE STEINBERG: Okay. So you're going to --

20 MR. HONIG: Just cite to this page in the
21 transcript.

22 JUDGE STEINBERG: Okay. We're still on number 10.
23 We'll receive number 10.

24 MS. SCHMELTZER: -- what.

25 MR. HONIG: Subject to that stipulation, I --

1 JUDGE STEINBERG: Why don't we receive it subject to
2 the stipulation?

3 MR. HONIG: Okay.

4 MS. SCHMELTZER: So it'll be subject to the
5 stipulation that this declaration does not go beyond the
6 license period.

7 MR. HONIG: Okay. Received with stipulation, okay.
8 Exhibit --

9 MS. SCHMELTZER: And, and, and the further
10 stipulation that paragraph six is qualified by paragraph five.

11 MR. HONIG: Hold on.

12 JUDGE STEINBERG: There's also, also the last clause
13 of paragraph six is, or anyone else for that matter is --

14 MS. SCHMELTZER: Beyond --

15 JUDGE STEINBERG: Yes.

16 MS. SCHMELTZER: It seems to me paragraph six just
17 ought to be stricken because it's already been said in
18 paragraph five.

19 MR. HONIG: Well, paragraph six, I think, goes
20 beyond paragraph five. I'm sorry to -- on this. Because in
21 addition to being the editor of the newspaper and associate
22 publisher, he's, he's a community leader and a person that
23 has, is, is, that, that one would normally expect a Commission
24 licensee to be in touch with for job openings or other
25 purposes, publishes a very large paper, and it certainly is

1 | unusual that he wasn't contacted for job referrals or anything
2 | else during the license term.

3 | JUDGE STEINBERG: Let's argue about paragraph six.
4 | Mrs. Schmeltzer's going to argue that it should be stricken?

5 | MS. SCHMELTZER: Right. Because, Your Honor, it's
6 | not rebutting anything in our direct case. We never
7 | represented that we had contacted him, and to require us to
8 | contact every black community leader is ridiculous.

9 | JUDGE STEINBERG: Okay. Let's, areas of agreement,
10 | one through five and paragraph seven are okay subject to the
11 | stipulation, correct?

12 | MS. SCHMELTZER: Correct.

13 | JUDGE STEINBERG: Okay. So arguing paragraph six --

14 | MR. HONIG: Your Honor, perhaps I can resolve, can I
15 | withdraw the last clause. I think it is germane that he
16 | wasn't contacted in regard to job referrals, which means that
17 | no one called him up on the phone and said do you know
18 | anybody. He is, after all, in the media business.

19 | MS. SCHMELTZER: Well, but we've already said that
20 | we didn't contact the newspaper and he is the editor of the
21 | newspaper. I think it's subsumed within paragraph five.

22 | MR. HONIG: Well, if, if subject to that
23 | stipulation, if that's counsel's understanding of it, then,
24 | then I don't think we have a problem.

25 | JUDGE STEINBERG: We'll strike the last clause or

1 anyone else for that matter, and we'll leave paragraph six
2 with the limitation that was stated on the record.

3 MS. SCHMELTZER: And the limitation is that we
4 didn't contact him in his capacity as editor in the newspaper.
5 I'm not going to concede that we had some obligation to
6 contact him in connection with some other responsibility that
7 we don't know about.

8 JUDGE STEINBERG: He wasn't contacted.

9 MR. HONIG: Noted.

10 JUDGE STEINBERG: Okay. Exhibit 10 --

11 MR. HONIG: Exhibit 11 is offered.

12 JUDGE STEINBERG: Wait. Exhibit 10 is received with
13 all those caveats and stipulations and whatever, whatever it
14 says on the record.

15 (Whereupon, the document marked as
16 NAACP Exhibit No. 10 was received
17 into evidence.)

18 JUDGE STEINBERG: Okay, Exhibit 11 is offered,
19 Mrs. Schmeltzer?

20 MR. HONIG: It is.

21 MS. SCHMELTZER: -- 11 is offered?

22 JUDGE STEINBERG: Yes.

23 MR. HONIG: Yes.

24 MS. SCHMELTZER: Yes, I object to Exhibit 11 as
25 irrelevant and immaterial. Mr. Woodard is not mentioned in

1 any of our direct case exhibits. The fact that he was very
2 briefly mentioned in, on page 15 of the document filed
3 February, 1990, does not mean that his testimony is in any way
4 material. We have a document that shows that, in fact, that
5 Cathy (Phonetic) Woodard from the same organization referred
6 candidates to us. And whether or not he's actually a Lutheran
7 minister is irrelevant. Certainly from his own declaration,
8 you can draw the conclusion as to why someone would have
9 thought he was a Lutheran minister or reverend.

10 JUDGE STEINBERG: Mr. Zauner?

11 MR. ZAUNER: Your Honor, could I have
12 Mrs. Schmeltzer state again where the reference to --

13 MS. SCHMELTZER: The only reference to Woodard --

14 JUDGE STEINBERG: Page 15 of the opposition to the
15 petition to deny.

16 MS. SCHMELTZER: To deny. According to this --

17 JUDGE STEINBERG: Attachment 7, Exhibit 4.

18 MR. ZAUNER: Oh, I'm sorry. I'm looking at
19 different page numbers, that's why I wasn't able to follow
20 that.

21 MS. SCHMELTZER: And it, an we have never claimed
22 that we hired people from his organization. It was just a
23 matter of soliciting some referrals. The fact that he doesn't
24 remember it is, frankly, irrelevant and immaterial.

25 JUDGE STEINBERG: Okay. Let me just, the reference

1 to Reverend Woodard is in Church Exhibit 4, Attachment 7.

2 MS. SCHMELTZER: We weren't offering --

3 JUDGE STEINBERG: Page 15 of the opposition --

4 MS. SCHMELTZER: Right.

5 JUDGE STEINBERG: -- which is page 20 of the
6 attachment.

7 MS. SCHMELTZER: Right. And we weren't offering
8 that for the truth of the matter asserted on that page. We'd
9 offered that exhibit because it supported another statement
10 that's in our -- specifically, specifically pages 9 through
11 11. The opposition is referenced in Church Exhibit 4, page
12 10, footnote 2. That's where we refer to the opposition. We
13 refer to the opposition pages 9 through 11, so we're only
14 referring to that opposition for a very limited claim.

15 MR. ZAUNER: Your Honor, the Bureau believes that
16 this declaration of Otis Woodard is relevant. There was a
17 claim made in a pleading filed with the Commission, upon which
18 the Commission had a right to rely, in February of 1990,
19 concerning the efforts that the station had made to recruit
20 minorities, and that reference at page 15 includes the
21 statement that Reverend Woodard has referred minority
22 applicants to KFUD and that was made in a pleading submitted
23 to the Commission by counsel representing the stations. And
24 now I find in the declaration of Otis T., D. Woodard that, in
25 fact, KFUD has never contacted me in regards to, to job

1 referrals for African-Americans or anyone else for that
2 matter. It seems to me that there is a direct contradiction
3 here between what is said in the pleading filed by the Church
4 and what is said in the declaration of Otis Woodard, and I
5 believe that, that this should be resolved.

6 JUDGE STEINBERG: Mr. Honig?

7 MR. HONIG: Yes. I would also like to point out
8 that in the hearing designation order itself, 9 FCC Record 914
9 at page 919, footnotes 10 and 11, the Commission expressly
10 relies on these referrals to the Lutheran Employment Project
11 in making its, its special --

12 MS. SCHMELTZER: That's not his organization.

13 JUDGE STEINBERG: His organization is Lutheran North
14 St. Louis Outreach.

15 MS. SCHMELTZER: Right. That's a different
16 organization.

17 MR. HONIG: I stand corrected then. Hold on, Your
18 Honor, hold on just one second, let me, I'm sure I could
19 button this up. Can we go off the record for a moment.

20 (Brief Recess.)

21 JUDGE STEINBERG: Back on the record.

22 MR. HONIG: There is another reference that I wanted
23 to mention that I hadn't mentioned previously. In the motion
24 to strike and reply to comments filed by KFUD, September 21,
25 1992, page 6 and 7, there is the statement that

1 Reverend Otis Woodard, a black Lutheran minister, had been
2 asked to send to KFUE all qualified applicants for any
3 position, and, and regardless of whether there's a controversy
4 over whether his wife was contacted, he, he expressly says
5 that that's not so, that's a representation that was made to
6 the Commission and, and, and there is a specific conflict,
7 and, and because there is a specific conflict in this
8 material, his testimony should be heard.

9 JUDGE STEINBERG: Okay. Exhibit 11 is received, but
10 I'm going to strike paragraph 5 as irrelevant for the same
11 reasons that I referred to with respect to the, I guess it's
12 Exhibits 1, 2, 3, and 4.

13 MR. HONIG: Sure.

14 JUDGE STEINBERG: So the remainder of it comes in,
15 so Exhibit 11 is received.

16 (Whereupon, the document marked as
17 NAACP Exhibit No. 11 was received
18 into evidence as stated.)

19 JUDGE STEINBERG: Now let's get to
20 Mr. Richard Miller. Everybody prepared for
21 Mr. Richard Miller. I am. I think we should take the
22 procedural objection first, and if I might summarize, well,
23 I'm not going to summarize, I'll let Mrs. Schmeltzer restate
24 her procedural objection, if she still is maintaining it.

25 MS. SCHMELTZER: I'm sorry?

1 JUDGE STEINBERG: Okay. Do you want me to start
2 again?

3 MS. SCHMELTZER: Yes.

4 JUDGE STEINBERG: Okay. We'll take Richard Miller
5 now. And I think the best way to proceed would be to take the
6 procedural objection first and make a determination on that
7 before we get to the substantive part of the objection, if we
8 get that far. Rather than me paraphrasing what you said
9 yesterday, why don't you just rephrase it, if you want to.
10 You don't have to, because I remember what you said.

11 MS. SCHMELTZER: -- the procedural objection was
12 that we were not apprised of Mr. Miller's name nor what he
13 would testify to until the opening day of the hearing. Last
14 week, Mr. Honig had informed me that he did have one
15 additional witness who might or might not provide a written
16 statement, and I had said to him if your witness is not going
17 to provide a written statement, you better put what he's going
18 to say, you better summarize the detail of what he's going to
19 say. Then I got the exhibits without any kind of a cover
20 letter that indicated there was one more possible declarant
21 out there and I assumed that the declarant who didn't want to
22 provide a written statement had, in fact, given one to
23 Mr. Honig and I had it. So we've been provided with
24 Mr. Miller's name incredibly late in this proceeding. We had
25 not been provided with a written statement of what he's going

1 to say. He's in the nature of an expert witness, and with
2 respect to expert witnesses, the Federal, the Federal rules of
3 civil procedure, specifically Rule 26, is now very precise
4 that you have to fill out in detail what an expert witness is
5 going to say, and he should have been identified long before
6 this date in response to our outstanding request for answers
7 to interrogatories. So I do have a very strong procedural
8 objection to the identification of Mr. Miller at this late
9 date with a very sketchy summary of the nature of his
10 testimony. I don't have substantive information.

11 JUDGE STEINBERG: Right. Mr. Zauner or Ms. Laden?

12 MR. ZAUNER: Your Honor, we agree that he should
13 have been identified earlier and that there doesn't seem to,
14 appear to be any valid reason for not having supplied a
15 statement of his testimony at the time the statements of the
16 other witnesses were provided. But, on the other hand, we
17 don't feel that we're necessarily prejudiced particularly by
18 this sole procedural -- on the part of the NAACP

19 JUDGE STEINBERG: Mr. Honig?

20 MR. HONIG: First, I, I am not aware, and if I'm
21 wrong someone perhaps could cite it to me, that the order that
22 specified that I was to notify counsel of witnesses that we
23 have that would testify on matters that, of which, that we
24 knew had knowledge, specified that such notification was to
25 occur immediately or just within a, a reasonable time. For

1 example, a non-party witness who testified yesterday was known
2 by KFUE to have relevant evidence nine days before or ten days
3 before we learned of, of him. And, of course, we saw what
4 happened. Mr. Miller was known, was, he --

5 JUDGE STEINBERG: Who was that, Mr. Lauher?

6 MR. HONIG: Yes. Mr. Miller was known to us,
7 depending on who can -- the conversations, five or six days
8 before yesterday, to have relevant knowledge and to be willing
9 to come forward subject to a subpoena. The procedure I
10 intended to follow was to submit the subpoena, argue in orally
11 or in writing ex parte Friday, and then upon giving him the
12 protection that to which I thought he would, he requested and
13 which I thought he was entitled --

14 JUDGE STEINBERG: Are you, is that interrupting your
15 train of thought?

16 MR. HONIG: Yes, a little.

17 JUDGE STEINBERG: Yes, please keep it down.

18 MR. HONIG: Yes. And to which I thought he was
19 entitled to proceed ex parte. The effect of my providing the
20 notification before the subpoena was signed would have had the
21 effect of, of eviscerating my ability to proceed ex parte as I
22 believed I was permitted to proceed and as one normally
23 proceeds with a subpoena. However, the subpoena wasn't signed
24 on, on Friday, so I intended to take it up yesterday.
25 Ms. Schmeltzer is correct that I did notify them that there

1 might be one additional person and I will state to the Court
2 that it was not my intention by not mentioning this witness in
3 my cover letter to imply that that witness was one of the
4 people who came forward with a statement. I was simply
5 proceeding ex parte as to Mr. Miller. Further, between close
6 of business Friday, when, when the subpoena was presented, and
7 the beginning of Monday, I don't think that there was, that's
8 a significant amount of working time that would have caused
9 material prejudice. Finally, I want to address the question
10 of Mr. Miller's status as an expert. We did proffer the
11 statements of five or six people who we intended as experts,
12 and these were scholars and concert musicians whose vitas and
13 resumes were submitted in support of their expert testimony.
14 Mr. Miller has expertise with the small E, in that as a person
15 who has been a licensee, he certainly knows what he's talking
16 about, but he's being presented for his knowledge of the
17 market and his knowledge of conditions in the market, not for
18 the fact that he's conducted scholarly studies and so forth.
19 So in that sense, he's, he's a fact witness on points and
20 contention. I'll reserve and stop here on the question of the
21 substance of what he's saying, but I, I hope that responds to
22 the procedural objections that have been raised.

23 JUDGE STEINBERG: Okay. I, this is my fault.

24 MS. SCHMELTZER: Can we get into substance?

25 JUDGE STEINBERG: Later. We're not going to, we'll

1 do procedure and then substance.

2 MS. SCHMELTZER: Can I just make a --

3 JUDGE STEINBERG: Yes.

4 MS. SCHMELTZER: That I think that we are severely
5 prejudiced here. It's extremely difficult to tell what his
6 testimony was going to be. It's not in writing. It's very
7 possible that had we seen it, it would be totally irrelevant
8 and we could move to strike. On the other hand, it's possible
9 that we would want to depose this individual and we've been
10 precluded from having the opportunity to do that. Now to do
11 it would -- to delay this hearing, which we do not want to do.

12 JUDGE STEINBERG: Okay. I, I, as I started to say,
13 this one is my fault entirely. When I set up the procedural
14 dates, I assumed, and you know what they say about someone
15 that assumes and this applies to me, that all the rebuttal
16 would be written. I didn't think that the rebuttal would be
17 oral, or any of it would have been oral.

18 MS. SCHMELTZER: I think we all agreed that --

19 JUDGE STEINBERG: In, in, in circumstances, well,
20 this is not a witness under Mr. Honig's control and if the
21 individual doesn't want to give a written statement, Mr. Honig
22 can't force him to and I can't force him to. I've faced that
23 in other cases and there's really nothing I can do about it,
24 there's nothing Mr. Honig can do about it. But that aside, I
25 didn't anticipate oral testimony. I have my procedural orders

1 in my word processor and I plug in the dates and make edits as
2 necessary, and, and the orders pop out as if by magic, and in
3 some of my procedural orders, I have provisions for oral. If
4 somebody is going to testify orally on the relevant exhibit
5 exchange date, I want you to exchange the name and address,
6 phone number, and a detailed outline of what the individual is
7 going to testify to. This was not included in any of my
8 orders in this case. Yesterday, you'll remember I said, I
9 took a break and I went out and I read the pre-hearing
10 conference transcript and it wasn't in there either. Whether
11 we said it off the record or not, I don't remember frankly.
12 And, but in any event, it wasn't on the record. So this was
13 my fault, for which I apologize. I'm not going to make, I'm
14 not going to hold Mr. Honig to strict procedural requirements
15 when his failure to do so rests on my shoulders. Recognizing
16 that, I also recognize that the Church has been somewhat
17 prejudiced because it's gotten this information at a late
18 date. I'm going to ask that, well, later on, I'm, you know,
19 assuming that the, that I'll have the witness come, I want
20 Mr. Honig, if you can, by close of business, not today but
21 close of business tomorrow, give the Church a detailed outline
22 of what he's going to testify to, not, you know, to the best
23 of your knowledge. You've interviewed him, somebody's
24 interviewed him, I, and, and the Bureau, I don't want to
25 forget the Bureau, as to what he's going to testify to. I'll

1 tell the Church that if they, if you want more time to digest
2 the material, to prepare cross-examination, if you want to
3 seek to depose him, if you want to seek to talk to him
4 informally with his counsel's consent, presence, or whatever,
5 you'll be accommodated. I don't want to do anything that's
6 going to take away from your handling your case. If you want
7 to put off his testimony until some later date and then
8 perhaps have it here, we consider that, we can consider that
9 and perhaps there can be some kind of cross, you know, when
10 you get him here.

11 MS. SCHMELTZER: Can we go into the substance
12 because it may alleviate all of this.

13 JUDGE STEINBERG: Okay, but, you know, what I'm
14 saying is it's, it's, I, I reluctantly and regretfully have
15 to, have to overrule your objection on the procedural grounds
16 because this is my fault. I, I should have been more careful
17 in my orders and I should have covered that contingency.
18 Okay, substantively, Mr. Miller is being called for, number
19 one, how a radio station persuades its advertisers to buy
20 time, the relative importance of specialized knowledge of a
21 format; two, qualifications that are appropriated considering
22 employment of a radio sales person; and, three, how difficult
23 or easy it is to identify and hire qualified minorities in the
24 St. Louis radio market. Is that correct?

25 MR. HONIG: That's correct.

1 JUDGE STEINBERG: So I took good notes this morning.

2 MR. HONIG: Thank you.

3 JUDGE STEINBERG: Okay. Now substantive objections?

4 MS. SCHMELTZER: Substantively, it seems to me that
5 Mr. Miller's testimony is no more relevant and material to
6 this case than some of the other NAACP exhibits that were
7 stricken. Mr. Miller has no particular knowledge about KFUD.
8 Indeed, he's never run a classical music station. He ran a
9 totally different format. He's just going to give a general
10 statement about how a radio station persuades its advertisers
11 to buy time. He has not run a religious station or a
12 classical station, so that information has no bearing on this
13 case. His consideration of what qualifications are
14 appropriate in considering employment of a radio sales person
15 may be totally different from any other station in the
16 country, so his testimony on that point is not relevant or
17 material. And his testimony about how difficult or easy it is
18 to find qualified minorities is also totally distinguishable,
19 yet we don't know the market he was, the specific area of
20 St. Louis he was in, we don't know what his salary structure
21 was. Again, it's apples and oranges. So to me, I, I don't
22 see that any of his testimony is relevant or material to
23 issues in this case, or -- competent to give this testimony.

24 MR. ZAUNER: Your Honor, the Bureau joins in that
25 objection and would also point out that as the Bureau

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1 | understands KFUD's case, KFUD is not contending that it was
2 | difficult to locate or hire qualified minorities in St. Louis,
3 | so this really isn't rebuttal material.

4 | MR. HONIG: If I may, KFUD did make those assertions
5 | in pleadings to the Commission repeatedly. I think that the
6 | point that Ms. Schmeltzer has made are entirely appropriate
7 | points to get into on cross-examination. The points that have
8 | been identified are, are all addressed not only in
9 | Mr. Stortz's testimony but, and I'll, I'll limit myself to
10 | this because we've already heard it in Mr. Cleary's testimony.
11 | Now I, I hope that you, you, it's not necessary to get someone
12 | who's run a commercial classical station in the same market to
13 | have someone who knows that they're talking about.

14 | JUDGE STEINBERG: Well, there was only one
15 | commercial station --

16 | MR. HONIG: That's right, there's only one, so we'd
17 | be sort of limited. So what we have is a retired, long-time,
18 | 22 or 23-year owner/operator of another station in the market,
19 | I think that's enough time, and, and a person who has run
20 | stations in other markets with different formats, that a
21 | person would, would, would, after that, after spending their
22 | lifetime in that business, most of it in that market, he knows
23 | that he's talking about. And, and for the same reasons that
24 | Jan Hutchinson's declaration, which speaks to many of these
25 | same points, that are addressed in Mr. Cleary's statement, is,

1 is, is relevant and appropriate to get her in the door of the
2 courtroom. Likewise, Mr. Miller addressing those points ought
3 to be heard.

4 MS. SCHMELTZER: Well, I, I think Jan Hutchinson is
5 quite distinguishable. First of all, she was mentioned by
6 Mr. Cleary. Secondly, she did work at KFUD.
7 Mr. Richard Miller has not been mentioned by anybody. He did
8 not work at KFUD. He has had no connection with KFUD. And if
9 his testimony could come in, then somebody out in
10 San Francisco could testify about how a radio station
11 persuades its advertisers to buy time. I mean to me this
12 opens the door for anybody to come in and testify about
13 anything.

14 MR. HONIG: Your Honor, we, we're only putting in
15 Richard Miller, not someone in San Francisco. He's in that
16 market and I'm glad that counsel didn't, didn't say he's not
17 competent, because he's very competent.

18 MS. SCHMELTZER: I did say he's not competent to
19 testify as to this particular proceeding.

20 JUDGE STEINBERG: Okay. I'm, I'm ready to, to rule.
21 I'm going to allow Mr. Miller to testify and you can test his
22 competence, qualifications, familiarity with the type of
23 format and the type of advertisers, etc., etc., on
24 cross-examination.

25 MR. HONIG: Your Honor, may I ask two procedural

1 questions?

2 JUDGE STEINBERG: Now, can you, by close of business
3 tomorrow, get to opposing counsel a detailed outline of what
4 he's going to testify to?

5 MR. HONIG: That, that was my first point. I can, I
6 would like to run it by Mr. Miller and his attorney, and the
7 difficulty is that while I'm pretty sure I can reach
8 Mr. Miller tonight, I don't know, you know, I don't know his
9 attorney and, and it may be that, that it may take an extra
10 day, but I will do my best if I can reach them both.

11 JUDGE STEINBERG: Okay. Now just for the record, I
12 have not signed a subpoena for Mr. Miller, it's still in my
13 office. I will sign it. He is scheduled to appear as your
14 first witness?

15 MR. HONIG: Yes.

16 JUDGE STEINBERG: That may have to change, because I
17 want KFUD to have a complete opportunity, I, I don't want them
18 and the Bureau, I don't mean to leave you out, to have a
19 complete opportunity to do what they have to do to effectively
20 cross-examine him. Now perhaps after we go off the record
21 this evening, you all can get together. I've got the
22 courtroom in St. Louis reserved for Monday, Tuesday, and
23 Wednesday, I think. Perhaps you can all agree on a time when
24 Mr. Miller's testimony will be taken, so it may be later
25 rather than earlier. If you can't agree, then you're going to

1 have to state your positions and I'll make a ruling. But I
2 want to give opposing counsel a full opportunity to prepare.
3 I think it's only fair. Now, again, this is, for lack of a
4 better phrase, my screw up and had I done that part of my job
5 properly, we wouldn't be in this situation. But I want to be
6 fair to you and I think I have been, and I want to be fair to
7 opposing counsel and I, and this is the only way I know how to
8 do it. Let's just see if you can all agree as to when his
9 testimony will be taken.

10 MS. SCHMELTZER: Well, we won't know whether we're
11 going to cross-examine him or not till we see his statement --

12 JUDGE STEINBERG: I'm, I'm willing to take bets on
13 whether you'll cross-examine him. But --

14 MR. GOTTFRIED: Well, Your Honor, since there is a
15 possibility that --

16 JUDGE STEINBERG: Well, it would, I would prefer
17 that his testimony be taken in St. Louis because that's where
18 he's located and it would be more expeditious to do it that
19 way and get it, and, and number one we'd get it over with.
20 But, as I said, I want to be fair to everybody and if you
21 can't, we may have to take his testimony later on here and
22 share his, share the cost of bringing him here.

23 MR. HONIG: Your Honor, we have no budget.

24 JUDGE STEINBERG: Well, I can't do anything about
25 that. You know, I, I've gone as far as I can go to be fair

1 to, to both sides, all three sides on this. So see if you can
2 work out some kind of an agreement.

3 MS. SCHMELTZER: Your Honor, on the, I think you had
4 reserved on --

5 JUDGE STEINBERG: Right. I've reserved ruling on
6 Number five.

7 MS. SCHMELTZER: And, and I'm not sure what was left
8 in contention there, this was on --

9 JUDGE STEINBERG: Oh, no. I just reserved ruling on
10 it. I didn't --

11 MS. SCHMELTZER: Oh.

12 JUDGE STEINBERG: -- everything was left in
13 contention. Let me tell you my problem with five. My, I
14 don't have, I don't have any problem with rejecting paragraphs
15 one through four for the reasons that I stated with respect to
16 Exhibits 1, 2, 3, and 4. My problem is with, is with
17 paragraph five.

18 MS. SCHMELTZER: We argue that she's not competent
19 to give that testimony, there are no, she's not saying what
20 she bases that on.

21 JUDGE STEINBERG: Well --

22 MR. ZAUNER: Not only that, Your Honor --

23 JUDGE STEINBERG: Well, that's the --

24 MR. ZAUNER: -- but I'd like to make an objection on
25 a different ground.

1 JUDGE STEINBERG: Well, that's, okay. Now let's,
2 you know, that's a problem and I recognize the problem, but
3 whether that is the basis for rejecting that paragraph or just
4 saying we'll cross-examine her on her knowledge, I don't know.
5 You know, that's what my problem with that is. Let, let me
6 hear from Mr. Zauner because maybe he'll solve my problem.

7 MR. ZAUNER: Well, I don't know whether I'll solve
8 your problem or not but the question of whether KFUD has a
9 large Afro-American listening audience may be, in fact,
10 answerable by audience measurement surveys that are taken in
11 the market, and if that is the case, that would be the best
12 evidence of the, of the listenership to KFUD, not this woman's
13 speculation. I don't see how she could possibly know the
14 number of Afro-Americans listening to KFUD in the St. Louis
15 market. To me, that's ludicrous on its face.

16 MS. SCHMELTZER: I mean --

17 MR. ZAUNER: What kind of survey did she do?

18 MS. SCHMELTZER: -- unfortunately, Your Honor, if
19 this comes in, we're going to have to claim that media audit
20 survey, that it was, that got Mr. Honig so upset in the first
21 place.

22 MR. HONIG: Your Honor, the only reason I didn't put
23 it in is that it, the copy we have is illegible. But the
24 reference to it is, is in, it's, it's the opposition to the,
25 it's in the opposition to the petition to deny.

1 MS. SCHMELTZER: Also, also, Your Honor --

2 JUDGE STEINBERG: Wait, wait, wait. What, let
3 Mr. Honig finish. The reference to what is in?

4 MR. HONIG: To the media audit, this survey on which
5 this, KFUD stated, I'm trying to find it, hold on one second.

6 MS. SCHMELTZER: I think it's pages 10 and 11 of the
7 opposition --

8 MR. HONIG: Can we go off the record for one second?

9 JUDGE STEINBERG: Yes, we're off, go off the record.
10 (Brief Recess.)

11 JUDGE STEINBERG: We're back on the record. It
12 seems to me that, as if, well, I'll tell you, I'm going to
13 deal with paragraph, I've reserved ruling on Exhibit 5 and I'm
14 going to reject it.

15 MS. SCHMELTZER: I just wanted to also say for the
16 record, she hasn't even said what time period she's talking
17 about.

18 JUDGE STEINBERG: I'm going to reject it for the
19 reasons earlier stated by counsel for the Church and for the
20 reasons which specifically with respect to paragraph five that
21 were stated by Mr. Zauner and Mrs. Schmeltzer that it has not
22 been shown that she's competent to make this statement.

23 (Whereupon, the document referred to
24 as NAACP Exhibit No. 5 was hereby
25 rejected.)

1 JUDGE STEINBERG: Now so that takes care of
2 Exhibits 1 through 11, and Mr. Zauner did get me out of my
3 predicament and I thank you.

4 MR. ZAUNER: Thank you.

5 JUDGE STEINBERG: Won't be the last time, I'm sure.
6 I think that if, well, I'm not going to, forget what I think.
7 You can all try your cases the way you see fit.

8 MS. SCHMELTZER: With the -- of cross-examination,
9 we would just like to, we'd like to reserve the right to make
10 -- with respect to Jan Hutchinson and Mr. Woodard by tomorrow
11 morning and we'd like to reserve the right to make a decision
12 about cross-examining Mr. Miller after we receive the detailed
13 summary --

14 JUDGE STEINBERG: Okay. So Michael Williams is not
15 going to be cross-examined in light of the stipulation?

16 MS. SCHMELTZER: That's correct.

17 JUDGE STEINBERG: So, so the universe people for
18 St. Louis would be Jan Hutchinson --

19 MS. SCHMELTZER: And Otis Woodard.

20 JUDGE STEINBERG: -- Otis Woodard, Richard Miller.

21 MS. SCHMELTZER: Right.

22 JUDGE STEINBERG: And --

23 MS. SCHMELTZER: I guess, you know, Your Honor, the,
24 the unfortunate part about Mr. Miller is we could be faced
25 with a situation where the only person that we request --

1 would be Mr. Miller simply because we don't have his written
2 testimony. I would really encourage the NAACP to obtain a
3 written statement.

4 MR. HONIG: Believe me, we tried. He's an old man.
5 He wouldn't give it to me.

6 JUDGE STEINBERG: How old is he?

7 MR. HONIG: Sixty.

8 JUDGE STEINBERG: That's not old.

9 MR. HONIG: Well, he, he -- he's retired.

10 MR. ZAUNER: As we, as we approach that age, we, we
11 --

12 MR. HONIG: He's not used to Commission proceedings.
13 He's, he's used to sitting in, where you testify and there's
14 direct and, and, and this was the best I could do. And I, I
15 went and met with him personally and it was the best I
16 personally could do.

17 MS. SCHMELTZER: I hope we could spare to
18 potentially make the Bureau, the Church, and, and Your Honor
19 travel all the way to St. Louis just because we haven't
20 received written testimony from this gentleman, and we'd have
21 to cross-examine him, it would be irresponsible for us to
22 agree not to cross-examine him when we haven't seen his
23 written testimony --

24 JUDGE STEINBERG: Well --

25 MR. HONIG: I was prepared to give us a busy